



## INTERNATIONAL TRADE COMMISSION

### [Investigation Nos. 337-TA-867/861 (Advisory Opinion Proceeding)]

#### Certain Cases for Portable Electronic Devices

#### Institution of an Advisory Opinion Proceeding

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to institute an advisory opinion proceeding in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted Inv. No. 337-TA-861 on November 16, 2012, based on a complaint filed by Speculative Product Design, LLC of Mountain View, California ("Speck"). 77 FR 68828 (Nov. 16, 2012). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cases

for portable electronic devices by reason of infringement of various claims of United States Patent No. 8,204,561 (“the ’561 patent”). The complaint named several respondents.

The Commission instituted Inv. No. 337-TA-867 on January 31, 2013, based on a complaint filed by Speck. 78 *FR* 6834 (Jan. 31, 2013). That complaint also alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain cases for portable electronic devices by reason of infringement of various claims of the ’561 patent. The complaint named several respondents. On January 31, 2013, the Commission consolidated the two investigations. *Id.*

All the participating respondents were terminated from the consolidated investigations as a result of settlement agreements, consent motion stipulations, or withdrawal of the complaint as to them. A number of the named respondents defaulted. On February 21, 2014, the ALJ issued his final initial determination finding a violation of section 337 as to claims 4, 5, 9, and 11 of the ’561 patent by the defaulting respondents and recommended issuance of a general exclusion order (“GEO”). Based on evidence of a pattern of violation and difficulty ascertaining the source of the infringing produces, the Commission agreed with the ALJ and issued a GEO directed to cases for portable electronic devices that infringe one of claims 4, 5, 9, and 11 of the ’561 patent.

On September 4, 2014, Otter Products, LLC of Fort Collins, Colorado (“Otter”) filed a request with the Commission asking for institution of an advisory opinion proceeding to declare that its Symmetry Series Products are not covered by the general exclusion order. Specifically, Otter requests that the proceeding consider: (1) whether, under section 337 and the Administrative Procedure Act, the GEO should apply to Otter’s imports absent a determination by the Commission in a violation or enforcement proceeding that Otter’s products infringe; (2) whether Otter’s products are covered by one or more of claims 4, 5, 9, and 11 of the ’561 patent; and (3) that the Commission consider the validity of the ’561 patent as part of this proceeding. On October 1, 2014, complainant Speck filed an opposition to Otter’s request.

The Commission has determined that Otter's request complies with the requirements for institution of an advisory opinion proceeding under Commission Rule 210.79 to determine whether Otter's Symmetry Series products infringe one or more of claims 4, 5, 9, and 11 of the '561 patent. The Commission has determined to reject Otter's argument that the GEO should apply to only products that were specifically before the Commission. *See Hyundai Elecs. Indus. Co. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1210 (Fed. Cir. 1990) (internal citations omitted) ("the Commission can impose a general exclusion order that binds parties and non-parties alike and effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing noninfringement."); *Multi Level Touch Control Lighting Switches*, USITC Inv. No. 337-TA-225, 1987 ITC Lexis 274, \*6 (Jul. 16, 1987) ("It is in the nature of general exclusion orders that they may apply to articles not before the Commission during the investigation.") The Commission has also determined to continue its longstanding practice of not considering the validity of the underlying intellectual property in advisory proceedings. *See Certain Rare Earth Magnets and Magnetic Materials and Articles Containing Same*, Inv. No. 337-TA-413, Denial of Request for Advisory Opinion at 1 (Nov. 1, 2010); *Multi-Level Touch Control Lighting Switches*, Inv. No. 337-TA-225 at \*5-6.

Accordingly, the Commission has determined to institute an advisory opinion proceeding to determine only whether Otter's Symmetry Series products infringe one or more of claims 4, 5, 9, and 11 of the '561 patent. The Commission has determined to refer Otter's request to the Office of Unfair Import Investigations ("OUII"). The parties will furnish OUII with information as requested, and OUII shall investigate and issue a report to the Commission within ninety (90) days of the date of publication of this notice in the *Federal Register*. The Commission will issue an advisory opinion within 45 days of receipt of OUII's written report. The following entities are named as parties to the proceeding: (1) complainant Speck and (2) Otter.

The authority for the Commission's determination is contained in sections 335 and 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1335, 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: October 22, 2014.

Lisa R. Barton,

Secretary to the Commission.

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